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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

September 8, 2011

Mr. Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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Dear Chairman Genachowski:

I was extremely disappointed to read that the FCC refuses requests for information from any of the 533 Senators and Members of Congress who do not chair either the House or Senate Commerce Committee. Unilaterally deciding that 99.6 percent of the elected representatives in the legislative branch have no legitimate interest in requesting and receiving information from the FCC is a misguided and unsupportable claim. However, you cite no actual legal authority to support it. Instead, you merely reference a general statement from a Congressional Research Service (CRS) report regarding the role of Congressional Committees. Specifically, the line from the CRS report is, “[t]he most common and effective method of conducting oversight is through the committee structure.” However, there are also less common methods of oversight that are no less legitimate. In fact, in a different section of the report that you cited, the report states “investigations and related activities may be conducted by . . . individual members.”¹

The FCC also cites the portion of the CRS report stating, “[i]ndividual members have no authority to issue compulsory process.” The phrase “compulsory process” refers to a Congressional subpoena. However, subpoenas are generally a last resort only after voluntary requests have been refused. Most of the information Congress receives does not require creating a legal obligation on the part of the agency to comply. Agencies should generally provide documents voluntarily to Members of Congress, especially if they would be required to produce the documents under the Freedom of Information Act anyway if requested by the general public.²

¹ Frederick M. Kaiser et al., Congressional Research Service, Congressional Oversight Manual, RL30240 (2011), at 20, [hereinafter CRS Report] available at <http://www.fas.org/sgp/ers/misc/RL30240.pdf>.

² Please note that the CRS Report which you have quoted says the following regarding Congressional document requests:

In more recent years, congressional committees have seemingly relied more heavily on staff level communication and contacts as well as other “informal” attempts at gathering information – document requests, informal briefings, etc. – before initiating the necessary formalistic procedures

It is unprofessional, unreasonable, and downright odd for the FCC to demand compulsory process before providing what it would be obligated to produce under FOIA and what it should produce for the sake of transparency and accountability. When Members raise legitimate questions, the focus should be on providing answers to ensure public confidence in the Commission, not looking for ways to dodge the issue. Before demanding a subpoena, the FCC should explain why it seeks to withhold or hide the information. Merely asserting that it has not yet been compelled does nothing to dispel the concerns that prompted the questions in the first place.

The Supreme Court has also long recognized the penetrating and far-reaching scope of the power of Congressional inquiry.³ This power of inquiry has its roots in the framing of the Constitution⁴ and is considered “co-extensive with the power to legislate.”⁵ In *Watkins v. United States*,⁶ the Supreme Court said:

[The] power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes . . . it comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.⁷

Moreover, it is for the Senate and its committees and subcommittees, and not for the Executive Branch or others, to determine whether there should be any restrictions on Members ability to request and receive information in connection with their legislative duties:

It would be an inappropriate intrusion into the legislative sphere for the courts to decide without congressional direction that, for example, only the chairman of a committee shall be regarded as the official voice of the Congress for purposes of receiving such information, as distinguished from its ranking minority member, other committee members, or other members of the Congress. Each of them participates in the law-making process; each has a voice and a vote in that process; and *each is entitled to request such information from the executive agencies as will enable him to carry out the responsibilities of a legislator*.⁸

Taken together, these precedents support the ability for Congress, including individual members, to conduct oversight investigations of Executive agencies – including the FCC.

In addition to these arguments for executive openness and transparency, there are also more direct concerns related explicitly to the FCC’s actions. In the past two months, the FCC

such as issuing committee subpoenas, holding on-the-record depositions, and/or engaging the subjects of inquiries in open, public hearings.

³ See, e.g., *Eastland v. United States Servicemen’s Fund*, 421, U.S. 491, 504, n.15 (1975).

⁴ See *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927).

⁵ *Queen v. United States*, 349 U.S. 155, 160 (1955).

⁶ 354 U.S. 178 (1957).

⁷ *Id.* at 187.

⁸ *Murphy v. Dep’t of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979) (emphasis added).

has faced a great deal of criticism for its decision from a wide range of sources including The Economist magazine, the Federal Aviation Administration (FAA), the Department of Defense (DoD), and the Department of Transportation (DOT).

On August 4th, *The Economist* wrote that the story behind the FCC's actions is a "sorry tale of greed, haste and incompetence."⁹ Three weeks prior, on July 12th, the FAA submitted a report which found that LightSquared's initial plans would have caused close to 800 deaths over a ten year period.¹⁰ On March 25th, the DoD and DOT wrote to the FCC criticizing the handling of LightSquared's application. In a joint letter, the Deputy Secretaries of Transportation and Defense wrote that they "were not sufficiently included in the development of the LightSquared initial work plan and its key milestones."¹¹ And that, "[t]he new LightSquared business plan and the new FCC rules significantly expand the terrestrial transmission environment, increasing the potential for interference to GPS receivers."¹²

While these statements in and of themselves are not direct proof of malfeasance, they do raise serious questions regarding the FCC's actions related to LightSquared. Given these continuing concerns regarding national security, public safety, and general good government, please provide the documents I requested in my letter to you on April 27, 2011.

In addition to my previous request, please answer to the following questions as well:

1. What consultation, if any, did the FCC have with other government agencies concerning LightSquared's waiver request prior to January 26, 2011?
2. What consultation, if any, did the FCC have with other government agencies concerning the March 26, 2010 FCC order regarding SkyTerra Communications and Harbinger Capital?
3. The FCC has publicly stated in the *Washington Post* that the "international bureau, wireless bureau, and engineering department jointly drafted [LightSquared's] waiver."¹³ What are the names of the specific FCC employees who worked on the FCC's January 26, 2011 waiver regarding LightSquared and what portions of the waiver did they write?
 - a. Did any FCC employees either perform or supervise any GPS interference testing prior to approving this waiver?
 - i. If so, what were the results of those tests?

⁹ The Economist, N.V., August 4, 2011; The Difference Engine: Off the radar.

¹⁰ LightSquared has claimed that these calculations do not reflect their current plan, but LightSquared has not denied that their initial plans, which they presented to the FCC, would have led to 794 fatalities.

¹¹ Letter from Department of Transportation Deputy Secretary John Porcari and Department of Defense Deputy Secretary William Lynn III to Federal Communications Commission Chairman Julius Genachowski, received March 25, 2011.

¹² *Id.*

¹³ Washington Post, Cecilia Kang, July 29, 2011; Analyst says key FCC staff excluded in LightSquared decision; Agency denies claim.

- ii. If not, why not?
- b. Did any FCC employees receive any data regarding GPS interference prior to approving this waiver?
 - i. If so, what were the results of those tests?

Thank you for your cooperation and attention in this matter. I would appreciate a response by September 22, 2011. If you have any questions, please do not hesitate to contact Chris Lucas for the Committee on the Judiciary at (202) 224-5225.

Sincerely,



Charles E. Grassley
Ranking Member



FEDERAL COMMUNICATIONS COMMISSION

October 28, 2011

JULIUS GENACHOWSKI
CHAIRMAN

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Grassley:

I received your letter of September 8, 2011, and hope that this response clears up some apparent misconceptions about Commission policy regarding information requests coming from individual members of Congress rather than from Congressional committees.

The Commission's policy, as described in my letter to you of July 26, 2010, is not unique to the Commission or of recent vintage. Over a quarter century ago, in 1984, the Justice Department noted that congressional access to agency documents is traditionally limited precisely along the lines of the FCC's policy – differentiating between requests from congressional committees and requests from individual members.¹ Both before and since the Justice Department issued its guidance, courts have consistently distinguished between information requests from Congressional committees and requests made by individual members.² The FCC is following this time-honored approach.

I share your concerns regarding national security, public safety and good government. More specifically here, I reiterate to you my previous assurances that the Commission will not make any decisions regarding LightSquared that jeopardize national security, public safety or the important services the GPS industry provides the American public. I have provided the same assurances on the record to the House Armed Services Committee's Subcommittee on Strategic Forces. I am attaching a copy of the letter that was entered into the record at that hearing. That

¹ U.S. Dep't of Justice, Office of Information Policy, FOIA Update, vol. V, no. 1 (1984) (available at http://www.justice.gov/oip/foia_updates/Vol_V_1/page3.htm).

² See, e.g., *Committee on the Judiciary v. Miers*, 558 F. Supp.2d 53, 67-68 (D.D.C. 2008) (House Judiciary Committee had power to enforce congressional subpoena; case distinguished from suits brought by individual members of Congress); *Walker v. Chaney*, 230 F. Supp.2d 51, 68 (D.D.C. 2002) (Comptroller General denied access to Energy Task Force records. "The record reflects that Congress as a whole has undertaken no effort to obtain the documents at issue, that no committee has requested the documents, and that no subpoena has been issued. Thus, an injury with respect to any congressional right to information remains wholly conjectural or hypothetical."); *Leach v. RTC*, 860 F. Supp. 868, 874 (D.D.C. 1984) (Ranking Member of House Banking Committee denied access to requested Resolution Trust Corporation files); *Lee v. Kelley*, 99 F.R.D. 340, 342 (D.D.C. 1983) (Senator Helms denied access to FBI's file on Martin Luther King). See also *Raines v. Byrd*, 521 U.S. 811, 829-30 (individual members of Congress do not have standing to bring an action to challenge constitutionality of Line Item Veto Act).

letter provides extensive background information and addresses several of the procedural questions that you have raised, including FCC coordination with other government agencies throughout the process.

In addition, as outlined in the attached letter for the record, the FCC has coordinated with other federal agencies throughout this process, pursuant to the terms of a memorandum of understanding (MOU) with the NTIA, which represents federal spectrum users, including the Department of Defense, Department of Transportation, Department of Energy, and NASA. Such coordination with other agencies has been FCC policy since the inception of the FCC under the Communications Act of 1934. This coordination permits technical experts to review engineering issues and resolve spectrum interference problems in a collaborative, inclusive and fact-based manner. That is exactly the process that is being run in the LightSquared matter.

Finally, I would like to note that I answered questions about LightSquared during the hearing before the House Appropriations Subcommittee on Financial Services on the FCC's appropriations for fiscal year 2012, and I later responded to several written questions for the record on this matter. Moreover, Julius Knapp, Chief of the Commission's Office of Engineering and Technology, testified before the House Armed Services Strategic Forces Subcommittee on September 15, 2011, and reiterated the FCC's commitment that the agency will not make any decisions regarding LightSquared that jeopardize national security, public safety, or the important services the GPS industry provides to the public.

These hearings and written exchanges have provided ample opportunity to address the national security, public safety and good government issues you have raised directly with me in your letters and through our staff-to-staff contacts. They also have afforded Congress the opportunity to hear from a broad cross-section of interested parties and stakeholders.

I appreciate the concerns you have raised, and emphasize that the FCC has worked hard – both through coordination with our federal partners and with all interested stakeholders – to assure that those concerns are taken into account through a fact-based and engineering-driven process. I am committed to ensuring that is how this process continues to be structured moving forward. I will continue to make staff available to discuss this matter further with you and your staff at your convenience.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Julius Genachowski', with a long horizontal flourish extending to the right.

Julius Genachowski

Enclosure